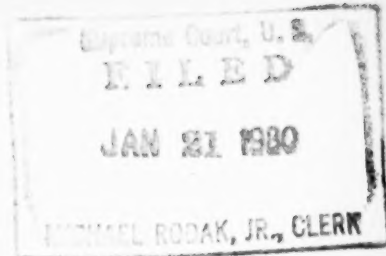


NO. 79-879



IN THE SUPREME COURT OF THE
UNITED STATES
October Term, 1979

RICHARD T. TRACY, SR., PETITIONER
v.
RODGER A. GOLSTON, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS
IN OPPOSITION

EDWARD JACOBSON
3100 Valley Center
Phoenix, Arizona 85073
Attorneys for Respondents

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Respondents in this action respectfully
request this Court deny the Petition for Writ of

Certiorari, seeking review of the decision of the United States Court of Appeals for the Ninth Circuit. A copy of the unpublished Memorandum Decision of the court of appeals is attached as Appendix A.

OPINIONS BELOW

The Petitioner herein, Mr. Richard T. Tracy, filed a state action in the Superior Court for Maricopa County, State of Arizona and a federal civil rights action in the United States District Court for the District of Arizona, arising out of the same factual background. The federal action forms the basis for Petitioner's Petition for Writ of Certiorari herein. In that action, the court of appeals, by Memorandum Decision, upheld the judgment of the district court dismissing all but one of Petitioner's claims. Preserved for further proceedings in the district court was Petitioner's allegation that statements made by members of the Judicial Selection Advisory Committee imposed upon him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities within the purview of Board of Regents v. Roth, 408 U.S. 564 (1972).

While in his Petition, Petitioner alleges that the district court directed he exhaust his

state administrative remedies before the federal court would consider his claims, the record fails to support that allegation. Nowhere in either the district court's oral pronouncement of judgment or in its formal written judgment was Petitioner required to exhaust any state administrative or judicial remedies.

Prior to the circuit court setting this case for oral argument, Petitioner petitioned this Court for a Writ of Certiorari Before Judgment. That Petition, No. 77-348, which contained many of the same arguments that are urged in the present Petition, was denied. 434 U.S. 912 (1977).

Even though the state cause of action is not before this Court on this Petition, Petitioner has based several of his arguments on that case. A final decision was rendered in the state action by the Arizona Supreme Court in Tracy v. Dixon, 119 Ariz. 165, 579 P.2d 1388 (1978). That decision held that Petitioner could show no entitlement to a position as city court judge under applicable state law. Petitioner also filed a Petition for Writ of Certiorari in the state action which Petition again was denied by this Court. 439 U.S. 983 (1978).

QUESTIONS PRESENTED

Petitioner's presentation of the issues posed by this case is somewhat difficult to follow. However, the issues stated before the Court of Appeals for the Ninth Circuit were as follows:

1. Was the district court correct in determining that Petitioner had neither actual nor de facto tenure and, therefore, had no property interest in reappointment to the position of Judge of the Phoenix City Court?

2. Was the district court correct in determining that Petitioner did not have a 42 U.S.C. §1983 action in the nature of defamation by reason of allegations of injury to reputation alone?

3. Was the district court correct in dismissing Petitioner's claim that the decision not to reappoint him was in retaliation for his exercise of First Amendment rights?

4. Was the district court correct in denying Petitioner's Motion for Partial Summary Judgment?

STATEMENT OF THE CASE AND FACTS

The events that lead to Petitioner filing state and federal actions are somewhat difficult to

determine from Petitioner's Brief and, thus, are hereinafter summarized.

Petitioner was appointed to the position of Phoenix City Judge by the Phoenix City Council to serve a single four-year term beginning on February 15, 1972 and expiring in February of 1976. This appointment was made pursuant to Chapter 8, Section 3(a) of the Phoenix City Charter.

Prior to the expiration of Petitioner's term, the City Council created the Judicial Selection Advisory Board, hereinafter referred to as the Advisory Board. The purpose of the Advisory Board was to recommend to the City Council the most highly qualified candidates for appointment to the city court bench. Public hearings were held by the Advisory Board to consider the potential appointees, including Petitioner.

The Advisory Board determined that it would not recommend Petitioner for a new or second four-year term. The City Council (in a public meeting where both Petitioner and his attorney were in attendance and allowed to make a presentation) decided to follow the Advisory Board's recommendation and did not reappoint Petitioner to a new four-year term.

Petitioner in his Petition asserts that he had tenure in his position as a City Judge and,

thus, was entitled to a due process hearing. Presumably, Petitioner must be alleged, implied or de facto tenure, for the record is without support for anything other than an office with a fixed four-year term. Thus, no possible construction could support a claim of actual tenure. In any event, the Arizona Supreme Court, in Tracy v. Dixon, 119 Ariz. 165, 579 P.2d 1388, cert. denied, 439 U.S. 983 (1978), held that Petitioner had no tenure, actual or implied, or any other entitlement to the office.

Before the Arizona Supreme Court rendered its decision in Tracy v. Dixon, supra, Petitioner filed suit pursuant to 42 U.S.C. §1983 against all but one member of the Phoenix City Council, all members of the Advisory Board and the Phoenix City Manager. Among other things, the Complaint requested a due process hearing, reinstatement to the office of City Court Judge, and monetary damages. Respondents moved to dismiss the Complaint.

In response to the Respondents' Motion to Dismiss, Petitioner filed a Challenge to the Array of Jurists on the ground that none of the district court judges could hear the case fairly for the reason that they were all members of the State Bar of Arizona and several of the named defendants were prominent local judges, including

the Chief Justice of the Arizona Supreme Court. Thereafter, Judge Walter Craig assigned the Motion to Dismiss to the Honorable Martin Pence, Senior United States District Court Judge from Hawaii, who was not a member of the State Bar of Arizona.

Petitioner also filed a Motion for Partial Summary Judgment. Both motions were consolidated for oral argument before Judge Pence.

After hearing oral argument on the motions, Judge Pence denied Petitioner's Motion for Partial Summary Judgment in its entirety and granted the Respondents' Motion to Dismiss except for that portion of Petitioner's Complaint which could be taken to state a liberty interest claim within the purview of Board of Regents v. Roth, 408 U.S. 564 (1972). The liberty interest claim portion of Petitioner's Complaint is still awaiting action in the district court.

Petitioner appealed from this judgment to the Court of Appeals for the Ninth Circuit which affirmed the district court. The court of appeals, relying on Bishop v. Wood, 426 U.S. 341 (1976); Board of Regents v. Roth, supra; and Perry v. Sindermann, 408 U.S. 593 (1972) rendered its affirmation by Memorandum Decision. It is that decision that Petitioner seeks to have the United States Supreme Court review.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Petitioner has failed to present with accuracy, brevity and clarity the reasons why Certiorari should be granted.

A review of the Petition for Writ of Certiorari fails briefly and clearly to present reasons why this Court should grant a Writ of Certiorari.

United States Supreme Court Rule 23(4) provides:

The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition.

The letter and spirit of this rule might well be applied herein.

2. Petitioner has not demonstrated reasons, of the character required by Rule 19, why a Writ of Certiorari should be granted.

United States Supreme Court Rule 19 sets forth a series of considerations which indicate the type of cases that are of sufficient moment for this Court to accept for review by way of a

Writ of Certiorari. Petitioner has failed to demonstrate that any of these "special and important reasons" apply in his case.

To begin with, Petitioner has not shown that the Memorandum Decision of the Court of Appeals for the Ninth Circuit is in conflict with any of its other decisions or the decisions of any other circuit. Nor has Petitioner demonstrated that the circuit court's decision is in conflict with any applicable decisions of the United States Supreme Court. Instead, the court of appeals decision follows precisely and is controlled by this Court's opinions in Board of Regents v. Roth, *supra*; and Perry v. Sindermann, *supra*. Again, Petitioner cannot demonstrate that the court of appeals opinion decided any important question of federal law that previously had not been settled by this Court.

The essence of Petitioner's case is that 42 U.S.C. §1983 was violated when the Advisory Board failed to recommend him for reappointment after expiration of his fixed four-year term as City Judge, and the City Council followed that recommendation by not reappointing him. This, Petitioner alleges, deprived him of a property interest protected by the Fourteenth Amendment to the United States Constitution. Civil rights cases involving alleged property interests are

neither new nor unusual. The legal standards to be applied in such cases have been established firmly by this Court for some time and were correctly applied in reaching the decision on Petitioner's case.

The court of appeals saw nothing important or unique about this case. Instead of issuing a published opinion on the matter, it filed a Memorandum Decision. Under Rule 21(b), Rules of the United States Court of Appeals for the Ninth Circuit, a memorandum decision is appropriate only when the case presents no legal issues of unique interest or substantial public importance and does not establish, modify, clarify or criticize an existing rule of law. It is submitted that the court of appeals correctly viewed Petitioner's appeal as one appropriate for a memorandum decision.

In his Petition, Petitioner has made a general and unsupported claim that the court of appeals and the district court have departed so far from the accepted and normal course of judicial proceedings that this Court is required to exercise its power of supervision. However, nothing in the record would reflect any departure from normal judicial proceedings.

At several points in the Petition, Petitioner alleges impropriety in the state court

proceedings. However, the actions of the state court are not before this Court in this Petition. The Petition for Writ of Certiorari is directed only to the decision of the Court of Appeals for the Ninth Circuit, not to the state courts. Petitioner previously had petitioned for a Writ of Certiorari from the state court decision, and that Petition was denied. 439 U.S. 983 (1978).

3. The court below fully considered and correctly decided the issues.

The basic reason Petitioner sets forth to support the granting of his Petition for a Writ of Certiorari is that the courts below, both state and federal, improperly have decided the merits of his case. However, a summary of the issues below and their resolution demonstrates that Petitioner's case was considered fully and decided correctly.

Petitioner's claim that forms the basis for his entire case was that, somehow, he was entitled to reappointment to a second four-year term as City Court Judge. Yet all of the courts that have passed upon the merits of Petitioner's case agree that the office of City Court Judge carried only a fixed four-year term and, therefore, Petitioner had no property interest in the office at the end of that term. Thus, under

Board of Regents v. Roth, supra, Petitioner failed to show that the fixed four-year position carried with it actual tenure beyond that term. And, Petitioner, similarly, was unable to demonstrate that it carried with it implied or de facto tenure as defined in Perry v. Sindermann, supra. As a result, no due process hearing was necessary as a predicate to failing to appoint him to a new four-year term.

Petitioner's inability to prove any entitlement to the second term under the applicable standards established by this Court is the key to his failure to have prevailed on the merits. It is submitted that all of the courts that have examined the merits applied the Supreme Court precedents correctly in reaching the decision that Petitioner had no tenure.

The second issue presented to the court of appeals is controlled by Paul v. Davis, 424 U.S. 693, reh. denied, 425 U.S. 985 (1976). Petitioner claimed that he had an action in the nature of defamation under 42 U.S.C. §1983 due to alleged defamation alone. Under Paul v. Davis, defamation under color of state law by itself is not enough to state a cause of action under 42 U.S.C. §1983. Before such an action will be recognized, there must be, in addition, a governmental action of a kind which would alter

or extinguish a right previously afforded by state law. However, Petitioner was not deprived of any state protected right. His fixed four-year term simply expired and he was not reappointed.

Petitioner's claim that the decision not to reappoint him was in retaliation for the exercise of his First Amendment rights is a conclusory allegation unsupported by fact. There was no link between any exercise of Petitioner's First Amendment rights and the actions of the Advisory Board or the City Council, nor has Petitioner been able to find one. The dismissal of this conclusory allegation was proper under United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 860 n.27 (1975) and Sherman v. Yakahi, 549 F.2d 1287 (9th Cir. 1977).

Based on the discussion above, it is submitted that both the district court's denial of Petitioner's Motion for Partial Summary Judgment and the affirmance thereof by the Court of Appeals for the Ninth Circuit were proper.

Other arguments Petitioner raises are inapplicable to the case at bar. For example, at page 23 of his Petition, Petitioner properly cites Re Laughlin, 153 Texas 183, 265 S.W.2d 805 (1954), for the proposition that the appropriate standard of proof for removing a judge from office is clear and convincing evidence. Peti-

tioner, however, fails to recognize that Judge Laughlin was being removed from office prior to the end of his elective term while Petitioner was not removed from office at all. Instead, Petitioner's fixed four-year term expired and he simply was not reappointed. The two fact situations are so dissimilar that the rule of In Re Laughlin, supra, is not in point.

In summary, Petitioner has failed to demonstrate why a Writ of Certiorari should be granted to allow review of this case. Not one of the considerations outlined in Rule 19 is present. Neither can Petitioner show that his case was not fully considered and correctly decided on the merits.

Review by Writ of Certiorari is not a matter of right but of sound judicial discretion. Nothing present in this case would call for this Court to exercise that discretion.

CONCLUSION

For the reasons set forth herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,
EDWARD JACOBSON

By EDWARD JACOBSON
Edward Jacobson

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD T. TRACY, Sr.,)
)
Plaintiff-Appellant,)
)
v.) No. 77-2034
)
RODGER A. GOLSTON,) MEMORANDUM
et al.,)
)
Defendants-Appellees.)

Appeal from the United States District Court
for the District of Arizona

Before: ELY and KENNEDY, Curcuit Judges,
and ORRICK,* District Judge.

The trial court was correct in dismissing those portions of the complaint alleging that the appellant had been deprived of a property interest. Decisions by the Arizona trial and Supreme courts, see Tracy v. Dixon, 119 Ariz. 165, 579 P.2d 1388 (1978), confirm that appellant had no entitlement, and on that question we are controlled by the law of the state. Bishop v. Wood, 426 U.S. 341 (1976). Even absent such a definitive decision, it is unlikely that the plaintiff would have been able to show a property interest or entitlement sufficient for stating a constitutional claim under Board of Regents v. Roth, 408

U.S. 564 (1972), and Perry v. Sindermann, 408 U.S. 593 (1972). Similarly, plaintiff's other contentions, both state and federal, are without merit.

The trial court retained jurisdiction of the claim by which plaintiff alleged deprivation of a liberty interest by reason of defendants' disclosures to the press, and that issue is not before us. The district court's decision on the matter for partial summary judgment is AFFIRMED.

*Honorable William H. Orrick, Jr., United States District Judge for the Northern District of California, sitting by designation.